

**ADMINISTRATIVE APPEAL DECISION FOR
PERMIT DENIAL
FOR THE PERSINGER/HUTCHISON (NOW KILLION) PROPERTY**

FAIRBANKS, ALASKA

ARMY CORPS OF ENGINEERS FILE 4-2002-0236

ALASKA DISTRICT

June 19, 2003

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California

District Representative: Christy Everett, U.S. Army Corps of Engineers, Alaska District, Fairbanks Field Office

Appellant Representative: Larry Peterson, Travis/Peterson Environmental Consult. Inc.

Authority: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Receipt of Request For Appeal (RFA): February 10, 2003

Appeal Conference Date: May 12, 2003 **Site Visit Date:** May 12, 2003

Background Information: The property is located in Fairbanks, Alaska, in an area identified for industrial development by the local municipality. The approximately 5.8 acre property is largely covered by wetlands within Clean Water Act jurisdiction. The Appellant proposed to develop the property for industrial use. The Appellant proposed to excavate approximately 9,920 cubic yards of material on-site from an approximately 0.9 acre gravel pit which would subsequently be used as open-water mitigation, and fill approximately 4.9 acres of wetlands on the property. The Appellant proposed to use the material to fill a slough that crosses the center of the property in an approximately east/west alignment, and then spread the remainder of the material evenly across the property. The Appellant proposed to retain the gravel pit as an open water area to provide compensatory mitigation for adverse impacts on the aquatic environment. The District concluded that less damaging practicable alternatives to develop the property were available and therefore denied the permit request because it did not comply with the Environmental Protection Agency, Clean Water Act, Section 404 (b) (1) Guidelines. The Appellant disagreed and appealed. The Persinger/Hutchison property was sold to Mr. Killion, who already owned an adjacent property, on March 12, 2003.

Summary of Decision: The District identified less damaging practicable alternatives to avoid and minimize adverse impacts on aquatic resources, and therefore denied the Appellant's permit request because it did not comply with the Environmental Protection Agency Clean Water Act, Section 404 (b) (1) Guidelines for Specification of Disposal

Appeal Evaluation, Findings and Instructions to the Alaska District Engineer (DE):

Reason 1: The Appellant asserted that the proposed activity should be considered water-dependent and that the District's determination that the proposed activity was not water-dependent resulted in a flawed analysis of the project.

FINDING: The appeal did not have merit.

ACTION: None required.

DISCUSSION: The Appellant asserted that since most of the property was wetland and a special aquatic site, that any use of the site would require access to an aquatic site. The Appellant therefore asserted that proposed project should be considered water-dependent. The Appellant further stated that logistics and local ordinances required any industrial project of this type to be in the South Fairbanks area and that this should be considered further evidence that the Appellant had proposed a water-dependent activity.

The Environmental Protection Agency, Clean Water Act, Section 404 (b) (1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material (40 Code of Federal Regulations (CFR) 230) (CWA 404 (b) (1) Guidelines) specify how the District determines whether or not a proposed activity is a water-dependent. Proposed activities that require access or proximity to the water to fulfill their basic project purpose, such as marinas and piers, are considered to be water-dependent. This is described in the Corps Standard Operating Procedures (April 8, 1999, page 8) and at 40 CFR 230.10 (a) (3). The District determined that the Appellant's basic project purpose for this action was "to provide business space" (administrative record page 8) and determined that the proposed activity was not water-dependent.

The Appellant did not explain why access to an aquatic site was needed to meet the basic project purpose of providing business space. Instead, the Appellant's stated reason for why the proposed activity required access to an aquatic site was that the Appellant's property was wetlands. This reason actually relates to whether or not the Appellant had a practicable alternative to avoid the use of an aquatic site, not whether the identified project purpose of providing business space required access to an aquatic site (Note: practicable alternatives are discussed under Reason 2 below). I determined the District reasonably concluded that "providing business space" does not require access to the water and therefore reasonably concluded that the Appellant's proposed project was not a water-dependent use.

Reason 2: The Appellant asserted that filling the entire property, except for an open water mitigation area, was the least damaging practicable alternative project for the property that met the Appellant's overall project purpose.

FINDING: The Appeal did not have merit.

ACTION: None required.

DISCUSSION: The District estimated at approximately 5.55 acres of the property was within CWA jurisdiction (admin record page 9) and determined virtually all of that jurisdictional area was wetlands. Wetlands are defined as a special aquatic site as described at 40 CFR Subpart E 230.41. Since the proposed activity was not water-dependent, and it was proposed for a special aquatic site, it became the Appellant's responsibility to clearly demonstrate that no less damaging practicable alternatives to the proposed activity were available as described in 40 CFR 230.10 (a) (3):

“Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.”

Also, the CWA 404 (b) (1) guidelines at 40 CFR 230.10 (a) (2) define a practical alternative as:

“An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”

The District identified the Appellant's overall project purpose as “to provide commercial lots in the South Fairbanks area.”

In the administrative record, the District identified practicable project alternatives to the Appellant's proposed project that it believed had fewer adverse effects on the aquatic environment, and did not have other significant adverse environmental consequences in accordance with 40 CFR 230.10 (a). The District identified as a practicable alternative that the Appellant could design a project in accordance with the Alaska District South Fairbanks General Permit (GP) 92-11M, which includes the South Fairbanks industrial area. GP 92-11M allows fills of up to 85 percent of a parcel provided that all conditions of the permit are complied with, including that at least 15 percent of each parcel shall be vegetated. Another condition of GP 92-11M is that no fill be placed or vegetation disturbed within 50 feet of the top of banks of specified permanent and intermittent sloughs. The District determined that one of these sloughs crossed the property. The District concluded that compliance with this condition of GP 92-11M would prevent disturbance of approximately 15 percent of the parcel and meet the 15 percent set-aside requirement of GP 92-11M. The District also identified a possible practicable alternative that included filling approximately 66 percent of the property, including the existing slough, under an individual permit authorization. The Appellant asserted that these were not practicable alternatives to his proposed project.

In the Request for Appeal, the Appellant stated that minimizing fill in the manner proposed by the District would significantly impede tractor-trailer operations by severely

restricting the necessary turn around space for heavy equipment, specifically tractor-trailer trucks. The Appellant then discussed the logistics of turning and moving heavy equipment. The Appellant's May 14, 2002 FAX transmittal (administrative record page 65) stated he was applying for a permit that was the same as for the adjoining property. This transmittal also stated that the slough area would be filled for two reasons:

“First, a drag-line has to be walked along the entire length of the gravel pit and the drag line has to have a stable base. Second, the applicant needs to maximize space for moving and storing equipment.”

The Appellant did not clearly demonstrate why the project alternatives proposed by the District were impracticable. The Appellant did not provide specific logistical or operational reasons why a practicable project was precluded by having the property bisected by the slough, nor why the orientation of the gravel pit could not be modified to reduce wetland fill as proposed by the District. Although the Appellant provided a general discussion of the operational requirements of heavy equipment, he did not relate that information to the specific configuration of the proposed business activities on this property in a manner that clearly demonstrated his proposed project was the least damaging practicable alternative.

Based on the administrative record and information provided at the appeal conference, it appears that the property owners at the time the permit application was submitted (the Persinger and Hutchison families) had no intention of actually operating an equipment storage business, but rather intended to fill and sell the property. In the August 9, 2002 Memorandum for File (administrative record page 43) of a telephone conversation between the Alaska District Regulatory Branch Chief Mr. Larry Reeder and the Appellant's representative Mr. Larry Peterson, Mr. Peterson is quoted as saying that the information he had provided to the District should be sufficient to allow the property owners to fill the entire property so they could sell it. Mr. Killion, the current property owner, stated during the appeal conference that the former property owners approached him regarding their desire to sell the property. Mr. Killion stated he told them that he wanted some idea of how he could use the property, and the former property owners then applied to the District for a permit to fill approximately 4.9 acres of the property.

As the permit applicants had proposed a very general activity, the cost, technology, and logistical constraints on that activity would also reasonably be very general. The District identified two less damaging practicable alternatives to the Appellant's proposed activity, and the administrative record shows the District was amenable to identifying additional options to minimize environmental effects on the wetlands on the site. The District's approach was consistent with the CWA 404 (b) (1) guidelines. The District reasonably concluded that the Appellant's proposed activity did not comply with the CWA 404 (b) (1) guidelines because it was not the least damaging practicable alternative.

Reason 3: The Appellant stated that he considered the District's decision on this permit to be arbitrary and capricious because the District has accepted open water mitigation areas as compensatory mitigation for numerous other permit actions in the vicinity.

FINDING: The appeal does not have merit

ACTION: None required.

DISCUSSION: The Appellant stated that he was aware of numerous other permits approved by the District that allowed for the use of open water mitigation areas as compensatory mitigation for the filling of wetlands, and for the environmental effects of gravel mining, placer gold mining, and industrial development.

The District agreed that open water compensatory mitigation had been used on many other projects in the past. However, the District explained that those projects had different project purposes and different measures to address adverse environmental effects than the project currently proposed by the Appellant. The Appellant's proposed fill activities do not involve gravel mining or placer mining, which in the local area typically must disturb wetland areas or other areas within Clean Water Act jurisdiction because of the location of the material to be mined. The Appellant's proposed project was not to establish a gravel extraction business, but rather to use on-site gravel as material to level the site for industrial development.

The Appellant identified two specific projects permitted by the Alaska District, File 4-9506662 and File 4-1991-0411, which in his opinion, showed the District acted in an arbitrary and capricious manner with regard to this permit request.

On May 3, 1996, the District issued a permit to Mr. Killion (File 4-9506662) for the purposes of expanding a topsoil processing business, storage of processing equipment, and space for material stockpiles, on the property adjacent to the Persinger/Hutchison property. These three project purposes are different from and not directly comparable to the project purpose identified for the Persinger/Hutchison property under appeal, and the permits are not comparable. Although the Appellant stated that his intent was to "copy" or have an authorization to fill wetlands in the same manner as the District authorized for File 4-9506662, the Appellant did not identify the same project purposes in the Persinger/Hutchison permit application as was used in File 4-9506662.

The District identified that the basic project purpose for File 4-1991-0411 was to construct a commercial subdivision. The District worked with that applicant to avoid and minimize adverse environmental effects on wetlands in a manner that retained higher quality wetland areas. The District then determined that proposed activity was consistent with the CWA 404 (b) (1) Guidelines and issued a permit on December 10, 2002. The project analyzed by File 4-1991-0411 was different from this proposal because that applicant accepted measures to avoid and minimize adverse aquatic impacts, while this Appellant asserted that no avoidance or minimization of wetland losses was possible. As explained in Reason 2 above, the District reasonably concluded that less damaging practicable alternatives that avoided and minimized adverse aquatic impacts were available, but this Appellant considers such measures unacceptable.

None of the specific projects nor the general categories of projects identified by the Appellant as comparable to this action actually have sufficiently similar circumstances to provide evidence that the District was acting in an arbitrary or capricious manner. There were differences between the project purposes and mitigation measures of the Appellant's project and those he considered equivalent projects. That the District reached different conclusions regarding permit actions with different circumstances than the Appellant's proposed activity provides no evidence that the District's decisions were arbitrary or capricious.

Reason 4: The Appellant asserted that the District's consideration of the wetland habitat value of the property was not reasonable, because the Appellant could mechanically remove (hydro-ax) all wetland vegetation from the site without a permit.

FINDING: The appeal does not have merit

ACTION: None required.

DISCUSSION: The Appellant asserted that since he could mechanically remove all the wetland vegetation from this property without Corps authorization, the District had overestimated the wetland habitat value of the property. While the District agreed that the Appellant could cut wetland vegetation without a Corps authorization (and not withstanding any other regulatory agency restrictions that may apply), this would not directly affect the District's evaluation of the wetlands on-site.

The Corps defines and delineates wetlands in accordance with 33 CFR 328.3 (b) and the Corp 1987 Wetland Delineation Manual. Unless property was modified in such a manner (either by an unregulated activity or in accordance with a Corp permit authorization) as to change site conditions so that wetlands would no longer occur there under normal circumstances, the Corps would still be required to consider the property a wetland and a special aquatic site. Whether such an action might occur in the future is unknown and speculative. The District reasonably did not consider such speculative future changes in its evaluation of current environmental conditions in regard to the Appellant's proposed activity.

Reason 5: In his request for appeal the Appellant described what he considered to be "numerous" errors in the District's decision document. The Appellant asserts that such numerous small errors if not corrected could result in an inappropriate permit denial

FINDING: The appeal did not have merit.

ACTION: None required.

DISCUSSION: The Appellant's comments regarding the numerous errors in the decision document are addressed below.

The CWA 404 (b) (1) Guidelines at 40 CFR 230.10 (a) – (d) identify restrictions on discharges that must be met for a discharge to be considered in compliance with the Guidelines. In order to be in compliance, a discharge must meet all requirements of those sections.

The Appellant stated the District did not demonstrate that the proposed activity would adversely affected the factors described in 40 CFR 230.10 (b), (c), or (d). The District's decision document is consistent with the Appellant's statement. However, the District reasonably concluded that the Appellant's proposed activity did not comply with 40 CFR 230.10 (a), as described in detail under Reasons 1 and 2 above. That conclusion is sufficient to determine that the Appellant's proposed activity does not comply with the Guidelines, and is a sufficient basis to deny the permit.

The Appellant asserted that the District incorrectly evaluated the effect of its permit denial decision on tax revenues, private property, and community cohesion. While Appellant admits that these reasons were not specifically cited as reasons for denial, he contends the District's flawed interpretation of these factors bolsters its reasons for denial. The District's evaluation of these factors was reviewed and found to be reasonable, and the administrative record shows that these issues were not substantial considerations in the District's decision to deny the permit.

Reason 6: The Appellant asserted that the property was not within Clean Water Act jurisdiction.

FINDING: This reason for appeal was not eligible for detailed consideration because it was not submitted in accordance with the Corps Administrative Appeal Process requirements.

ACTION: None required.

DISCUSSION: This reason for appeal was not submitted with the Appellant's original Request for Appeal dated December 12, 2002, which was returned to the Appellant as incomplete, nor was it included in the Appellant's revised Request for Appeal dated March 11, 2003, which was accepted for detailed consideration. There was no indication in the administrative record of this action that the Clean Water Act jurisdictional status of this property was in dispute, and the Appellant indicated that he considered the area with Clean Water Act jurisdiction by applying for a Corps permit. The Appellant first indicated to the Review Officer that he had objections to the District's Clean Water Act jurisdictional determination on April 30, 2003. As stated in the Corps regulations at 33 CFR 331.7 (e) (6):

“The purpose of the appeal conference will be to discuss the reasons for appeal contained in the RFA (Request for Appeal). Any material in the administrative record may be discussed during the conference, but the discussion should be focused on relevant issues needed to address the reasons for appeal contained in the RFA... Issues not identified in the administrative record by the date of the

NAP (Notice of Appeal process, i.e. the letter to the Appellant providing the permit denial) for the application *may not be raised* or discussed, because substantive new information or project modifications would be treated as a new permit application." Parentheses and italics added.

Therefore, the Division did not consider this reason for appeal.

Information Received and its Disposition During the Appeal Review: In addition to the administrative record, the following information was reviewed during the appeal.

- 1) The Appellant provided a one page memo on May 23, 2003 clarifying his position regarding issues discussed at the appeal conference.
- 2) The District provided a one page memo on May 29, 2003 clarifying their position regarding issues discussed at the appeal conference.
- 3) The review officer reviewed the decision documents and permits issued for Alaska District file numbers 4-9506662 and 4-1991-0411, which were specifically identified by the Appellant as providing evidence that the District has acted in an arbitrary or capricious manner regarding the permit decision for this action.

Conclusion: The District identified less damaging practicable alternatives to avoid and minimize adverse impacts on aquatic resources, and therefore denied the Appellant's permit request because it did not comply with the Environmental Protection Agency Clean Water Act, Section 404 (b) (1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material) 40 CFR 230. I conclude the District's decision was reasonable and is supported by the administrative record. The appeal did not have merit.



Robert L. Davis
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